NO. **55897-1-II**

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
TIMOTHY LYNN RASMUSSEN, SR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE KATHERINE L. SVOBODA, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Although the State disagrees with some of Appellant's editorial comments, he sufficiently set forth the facts and procedural history of this case in his brief. In addition, the State notes the following.

The jury was instructed in instruction number 1, CP 9 (of 8-13), that "the lawyer's statements are not evidence" and that they "must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions." Indeed, during the State's closing, the court overruled a defense objection based on facts not in evidence, but told the jury to "disregard any facts presented that are not supported by the testimony." 03/25/21 RP 151.

The first paragraph of the "to convict" instruction, number 6, provided as follows:

> To convict the Defendant of the crime of Violation of the Uniform Controlled Substances Act – Possession of Heroin with Intent to Deliver, each of the following elements of the

> crime must be proved beyond a reasonable doubt[.]

CP 11 (of 8-13).

The jury's verdict stated that "[w]e, the jury, find the Defendant Guilty of the crime of Violation of the Uniform Controlled Substances Act – Possession of Heroin with Intent to Deliver as charged." CP 16.

ARGUMENT

1. Appellant did not receive ineffective assistance of counsel.

A criminal defendant has the right to effective assistance of counsel. U.S. CONST. amend VI; *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing such a claim falls on the defendant. *Strickland,* 466 U.S. at 687. To prevail, Mr. Rasmussen must show that (1) his attorney's conduct fell below a professional standard of reasonableness (the performance prong), and that, (2) but for counsel's unprofessional errors, there is a reasonable

probability the outcome of the trial would have been different (the prejudice prong). *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If he fails to establish either prong, the inquiry ends. *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. *Strickland,* 466 U.S. at 689.

To establish deficient performance in the context of a failure to object to testimony, a defendant must show that the failure to object fell below prevailing professional norms and that the objections would likely have been sustained. *State v. Johnson,* 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 714, 101 P.3d 1 (2004)).

To establish prejudice, a defendant must show that, but for trial counsel's deficient performance, the outcome of the trial would have been different.

Appellant does not show either deficient performance or prejudice. As will be demonstrated herein, he did not receive ineffective assistance of counsel below.

A. King and Tully's testimony were not hearsay, did not violate the confrontation clause and did not an express an impermissible opinion of guilt; defense counsel was not ineffective for not objecting.

i. The officers' testimony was not hearsay.

The officers' testimony did not constitute hearsay or violate the confrontation clause. " 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " *State v. Hudlow,* 182 Wn. App. 266, 282, 331 P.3d 90 (2014) (quoting U.S. CONST. amend. VI.). Hearsay evidence implicates the right to confrontation. *State v. Neal,* 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

According to ER 801(c) hearsay is an out of court statement offered to prove the truth of the matter asserted therein. *Hudlow,* 182 Wn. App. at 278. Hearsay is inadmissible unless an exception to the rule applies. *Id.*

Whether a statement is hearsay depends on the purpose for which it is offered. *State v. Garcia*, 179 Wn.2d 828, 845, 318 P.3d 266 (2014). A statement is not hearsay when offered as a basis for inferring something else rather than to prove the truth of the matter asserted. *Id.* Whether a statement is hearsay is a question of law reviewed de novo. *Neal*, 144 Wn.2d at 607.

Division One of this Court addressed a similar issue in *State v. George*, 21 Wn. App. 2d 1054 (2022), No. 83309-0-I (originally Division Two No. 54475-0-II, transferred to Division One).[1]

In *George*, a member of the Grays Harbor Drug Task Force testified as follows:

> Here, Officer Strong testified as to how DTF chooses its targets for investigation. He stated that DTF "generally operate[s] with people who give un information," and "get[s] the word on the street who are the mid to upper-level targets." George contends Officer Strong's testimony implied that DTG targeted George based on this information

[1] Unpublished opinion, cited pursuant to GR 14.1 as persuasive authority.

> and was "thinly veiled Hearsay" that implied George possessed drugs with intent to deliver.
>
> Officer Strong's statements were not hearsay. He did not repeat statements from informants for the truth of the matters asserted. Rather, he provided a general description of the task force's method of choosing who to investigate which happened to include the use of informants. George's right to confrontation was not violated by admission of improper testimonial hearsay.

George at 9 (alterations in the original).

In the case at hand, the testimony of King and Tully was no different than that of Officer Strong in *George*. They did not "repeat statements from informants for the truth of the matters asserted" but "provided a general description of the task force's method of choosing who to investigate . . ."

ii. The officers' testimony was not an expression of their opinion as to Appellant's guilt.

Nor was King and Tully's testimony an impermissible expression of their opinion as to Appellant's guilt. Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony

is unfairly prejudicial to the defendant "because it invade[es] the exclusive province of the [jury]." *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). In determining whether statements are in fact impermissible opinion testimony the court will generally consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 759 (citing *Heatley,* 70 Wn. App. at 759).

Opinion testimony is "testimony based on one's belief or idea rather than on direct knowledge of facts at issue." *Demery*, 144 Wn.2d at 760 (citations omitted). Courts "ha[ve] expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." *Demery,* 144 Wn.2d at 760 (quoting *Heatley,* 70 Wn. App. at 579).

A claim that witness testimony was an improper opinion on guilt is not automatically reviewable for the first time on appeal as a manifest constitutional error. *State v. Kirkman,* 159 Wn.2d 918, 936, 155 P.3d 125 (2007). To constitute manifest constitutional error, the opinion on the defendant's guilt must be "explicit or nearly explicit." *Id.* "This exception is a narrow one, and we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences." *Id.* at 934-35. By raising the issue for the first time on appeal, Rasmussen must prove that the officers' testimony was an "explicit or nearly explicit" opinion of guilt. *Kirkman,* 159 Wn.2d at 936.

The absence of an objection by defense counsel strongly suggests that the argument or event in question did not appear critically prejudicial in the context of the trial. *State v. Swan,* 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), cited by Appellant on pages 25 & 27 of his brief, was a prosecution for possession of pseudoephedrine with intent to manufacture methamphetamine. In *Montgomery*, after a detective testified that he had followed the codefendants from store to store as they acquired pseudoephedrine, the prosecutor asked whether the detective had "formed any conclusions." *Id.* at 587. The detective replied: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." *Id.* at 588. There was no objection to the question or response. *Id.* Also without objection, the detective testified that "those items were purchased for manufacturing." *Id.* Further, a forensic chemist called by the State, after reviewing the materials possessed by the codefendants,

testified: “these are all what lead me toward this pseudoephedrine is possessed with intent.” *Id.* The defense did not object. *Id.*

Montgomery held that the above-quoted testimony of the detective and forensic chemist amounted to improper opinions on guilt. *Id.* at 594. However, despite finding that the expressions of opinion on guilt had been direct and explicit, the court held that Montgomery had not established manifest error affecting a constitutional right necessary to challenge the testimony for the first time on appeal. *Id.* at 595 (citing RAP 2.5). Montgomery had not established actual prejudice because the jury had been properly instructed, the jury was presumed to follow the instructions, and there had been no written jury inquiry or other evidence that the jury was unfairly influenced. *Id.* at 596 (citing *Kirkman,* 159 Wn.2d at 928).

Unlike in *Montgomery,* where the improper opinion testimony was direct, explicit and relatively extensive in

response to the prosecutor's questions, here, the officers made no statements as to their belief in the Appellant's guilt.

If there was error at all, it was not a manifest constitutional error that resulted in actual prejudice. The jury was properly instructed. The State's evidence was strong.

Mr. Rasmussen claims that his attorney's failure to object to the officers' testimony constitutes ineffective assistance of counsel. This claim must be rejected. For the reasons argued above, the officer's testimony was not an improper opinion on guilt, nor was it hearsay; therefore, the lack of objection did not amount to substandard performance.

As argued above, the officer's testimony was not an opinion on Mr. Rasmussen's guilt, nor was it hearsay in violation of the confrontation clause. His attorney cannot be faulted for failing to object to unobjectionable testimony.

Moreover, even if his attorney *could have* objected to the testimony based upon one inference to be drawn from it, the

decision whether to object is a "classic example of trial tactics." *State v. Madison,* 53 Wn. App. 754, 763, 770 P.2d 662 (1998). Reviewing courts presume that the failure to object was legitimate trial strategy, and Mr. Rasmussen bears the burden of rebutting this presumption. *Davis*, 152 Wn.2d at 714. Mr. Rasmussen's defense was one of denial and insufficient evidence, and it is likely that his trial attorney saw the testimony for what it was and tactically decided not to object to avoid bringing further attention to the issue of why Mr. Rasmussen became a target of DTF in front of the jury.

In a slightly different context, sometimes an officer is merely stating the obvious when he or she testifies that "arrested the defendant because he had probable cause to believe he committed the offense." *State v. Elliot*, 7 Wn. App. 2d 1046 (2019) at 6, quoting *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *aff'd on other grounds,* 165 Wn.2d 870, 204 P.3d 916 (2009) (*Elliot* cited pursuant to GR

14.1). "That is true when the point of the testimony is that the officer made the arrest – not that the officer believed the defendant was guilty." *Elliot* at 6. In this context, there is no difference between stating the basis for the investigation versus the intent or reason to make an arrest.

Even if his attorney should have objected, Mr. Rasmussen fails to establish the prejudice prong of *Strickland.* For the same reasons that any error in the admission of the testimony was harmless beyond a reasonable doubt, Appellant cannot show that there is a reasonable probability the outcome of the trial would have been different absent the testimony. His claim of ineffective assistance of counsel on this ground should be rejected.

B. Evidence of Appellant's lack of employment was not admitted to show motive; however, it was relevant, was addressed only briefly and was not made a point of primary focus for the jury.

Evidence of poverty is generally not admissible to show motive. *United States v. Mitchell,* 172 F.3d 1104, 1108 (9th Cir.

1999). The State may not introduce evidence of poverty simply to suggest that poor people are more likely to steal than wealthy people. *State v. Matthews,* 75 Wn. App. 278, 286, 877 P.2d 252 (1994).

In *Matthews,* evidence of the defendant's bankruptcy was properly admitted to show his motive to commit robbery. *Matthews,* 75. Wn. App. at 284-85. In *State v. Jones,* 93 Wn. App. 166, 968 P.2d 888 (1998), evidence of the defendant's lack of lawful income was properly admitted to rebut his anticipated explanation for the large sum of money found on his person after an alleged drug transaction. *Jones,* 93 Wn. App. at 172-76. Although both cases caution against the admission of financial evidence solely for the purpose of showing that a defendant is poor and therefore more likely to commit a financially motivated crime, neither should or can be read to prohibit the evidence and prosecutor's arguments below.

In *Jones,* $422 found on Jones immediately after a suspected drug deal was offered to show that Jones likely obtained the cash by dealing cocaine. *Jones*, 93 Wn. App. at 175. "*The relevance and probative value of this large sum of money after an alleged drug deal is undisputed." Id.* (emphasis added). The court in *Jones* found:

> We conclude that the State was entitled to anticipate Jones's defenses in this manner. The evidence was not intended to establish that Jones was a drug dealer simply because he had no reported income; rather, the financial reports became relevant when the State presented evidence of money found on Jones's person during his arrest and inquired about its source.

Id.

Significantly, the exploration of the topic of financial resources in *Jones* was much more extensive than the two questions to a defense witness and one statement in closing in the case at hand:

> During cross examination, the State questioned Jones at length about his recent sources of income, his living arrangements, and the cars he

> has owned. Jones referred to working at two Burger King restaurants and to doing several odd jobs for friends and acquaintances, but he largely failed to substantiate his claims with names, locations, or details.

Jones, 93 Wn. App. at 176, footnote 19.

> We stress, however, that any inquiry into a criminal defendant's financial situation should be undertaken with extreme care. Even when this exploration is warranted, the prosecution must "proceed gingerly in its exploration." *Matthews,* 75 Wn. App. at 286, 877 P.2d 252 (*citing Davis v. United States,* 409 F.2d 453, 458 (D.C. Cir. 1969)). The evidence should be sufficiently limited to its purpose so that any stigma of bankruptcy or poverty *is not made a point of primary focus for the jury.* Jones complains that he was "endlessly drilled" by the prosecution about the employment documents and his financial situation. *While we recognize that the prosecutor came dangerously close to placing undue weight on Jones's unemployment, we do not think he crossed the line in this case.*

Id., footnote 20 (emphasis added).

Two questions on cross examination and one statement in closing. That's the amount of time the State devoted to this issue. It was not made "the primary focus for the jury", *Jones, supra.* The $909 in cash and Appellant's lack of employment

was not introduced to show that the Appellant was poor and therefore more likely to deal drugs. Evidence of drug dealing was found in Appellant's residence. Neither he nor his wife were employed. A significant amount of cash was found. Where did it come from? That was a relevant question. It was as simple as that.

Once again, the absence of an objection by defense counsel strongly suggests that the argument or event in question did not appear critically prejudicial in the context of the trial. *Swan,* 114 Wn.2d at 661.

Defense counsel did not object to the questions about employment nor its brief mention in the State's closing. He did address it in his own closing, essentially turning it on its head and making it his own:

> The State says, well, he is poor. He doesn't have a job. He must be dealing drugs. A lot of people are out of work right now. There is a pandemic going on. That doesn't mean they have all turned to drug dealing. Just because your significant other deals drugs allegedly maybe deals drugs or has drugs,

> doesn't mean you are a drug dealer. Even if you frown upon it, him knowing she has drugs, doesn't mean they are his drugs. Is he required to call the State, and be like, Officer Tully, please come arrest my wife, she does drugs in our house. No. He should tell her, don't do that. Get rid of the drugs. Get clean, which is what Shelly said happened.

03/25/21 RP 159.

Trial counsel was not ineffective for failing to object to this line of questioning and the State's brief reference to it in closing. The appeal on this ground should be denied.

C. There was no prosecutorial misconduct. The prosecutor's statements were not flagrant nor ill intentioned and error, if any, could have been cured by an instruction. Appellant fails to show a substantial likelihood that the comments affected the jury's verdict, especially given the evidence and the instructions.

In order to prevail on a claim of prosecutorial misconduct, an appellant must establish that the comments or arguments complained of were both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The court first determines whether the comments were improper, *Id.*

at 759, and, if so, whether there was resulting prejudice. *Id.* at 760. Prejudice is established by showing a substantial likelihood that such misconduct affected the verdict. *Id.*

A defendant who does not object at trial is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Id.* at 760-61. This is a heightened standard, under which an appellant must demonstrate that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761. In making this determination courts "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762. Courts look at the comments in light of the total argument, the evidence, the issues in the case and the jury

instructions. *State v. Warren,* 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Appellant claims that the prosecutor's statement that the safe in the bedroom was "open", and her misstatement as to the amount of heroin seized (in terms of ounces, not grams), was prejudicial. The jury is presumed to follow the court's instructions. *State v. Anderson,* 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied,* 170 Wn.2d 1002 (2010). The jury was instructed that "the lawyer's statements are not evidence" and that they must disregard "any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 9 (of 8-13); Instruction number 1. At one point during the State's closing the judge instructed the jury to "disregard any facts presented that are not supported by the testimony." 03/2521 RP 151.

Detective Tully identified a picture of a safe found in the bedroom. RP 106. This photo was admitted into evidence as

exhibit 15 and was available to the jury. The jury could see for itself the position of the door when it was found. Detective Tully testified that he accessed the safe without the combination; i.e. it was unlocked. RP 102, 107. The words "open" and "unlocked" are frequently used interchangeably. Although "unlocked" may have been a better choice for the prosecutor than "open" or "wide open", the point of the prosecutor's argument was that Appellant was not excluded from accessing the safe when it was found by DTF; it was not locked. And whether the door to the safe was open or closed is irrelevant; the jury had Officer Tully's testimony and the photo to show the safe as it was found.

As for the weight of the heroin, Deborah Price of the WSP crime lab tested one of the two baggies containing the suspected heroin, found that it contained heroin and that it weighed 8.24 grams. RP 64-66. The heroin was admitted into evidence as exhibit 54. CP 47. The jury had it available to

them. Once again, the jury was instructed to disregard any statement not supported by the evidence. CP 9; Instruction no. 1. There is no possibility that the jury mistook what was basically a third of an ounce of heroin for approximately one half pound of heroin.

"[T]he jury is presumed to follow the instruction that counsel's arguments are not evidence. Given the weight of the properly admitted evidence against Warren, he has failed to show that he was prejudiced by the prosecutor's comments." *Warren,* 165Wn.2d at 29 (citations omitted).

It was within the province of the jury to determine whether the argument was supported by the facts in evidence. Appellant fails to show a substantial likelihood that these comments affected the jury's verdict, especially given the evidence and instructions.

For the same reasons as argued previously, Appellant shows neither deficient performance nor prejudice as the result

of trial counsel's failure to object. Appellant's appeal on this ground should be denied.

2. The to convict instruction identified the controlled substance by virtue of the prefatory language in the instruction: "[i]n order to convict the defendant of the crime of possession of a controlled substance with intent to deliver – heroin". The jury verdict expressly found the Appellant guilty of possession heroin with intent to deliver. Accordingly, any error in the instruction is harmless beyond a reasonable doubt and the instruction and verdict support both Appellant's conviction and his sentence.

The adequacy of a challenged "to convict" instruction is reviewed de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). A to-convict instruction must contain all essential elements of the crime charged. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). "[T]he omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal." *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015) (citing *Mills*, 154 Wn.2d at 6). The identity of the controlled substance is an essential element when it increases a defendant's

maximum sentence. *State v. Goodman,* 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). Here, the identity of the controlled substance increases the maximum sentence. Possession with intent to deliver heroin, among others, is punishable as a class B felony, RCW 69.50.401(2)(a), with a maximum possible penalty of 10 years in prison, while possession of other controlled substances with intent to deliver is punishable as a class C felony, with a maximum possible penalty of 5 years in prison. RCW 69.50.401(2)(c), (d) and (e). Omission of an essential element is subject to harmless error analysis. *State v. Clark-El*, 196 Wn. App. 614, 620-21, 384 P.3d 627 (2016).

The right to a jury trial requires that the sentence imposed be authorized by the jury's verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). Where the court imposes a sentence that is not supported by the jury's verdict, the sentence must be reversed, and resentencing is required. *Clark-El*, 196 Wn. App. at 624 (citing *Williams-*

Walker, 167 Wn.2d at 900-01). Conversely, the court's reasoning in *Clark-El* would suggest, if not compel, the conclusion that when the jury verdict does support the sentence imposed by the court, the failure to identify the substance in the to-convict instruction would be harmless beyond a reasonable doubt.

In *Clark-El,* the to-convict instruction did not identify the controlled substance, nor did the jury's verdict. Consequently, the case was remanded for sentencing. *Clark-El,* 196 Wn. App. at 625.

In *State v. Rivera-Zamora,* 7 Wn. App. 824, 435 P.3d 844 (2019), a Division Three case, the defendant was convicted of both delivery of, and possession with intent to deliver, methamphetamine. Despite the fact that the word "methamphetamine" did not appear in the to-convict instruction, the court found that Rivera-Zamora did not

establish manifest constitutional error. *Rivera-Zamora* at 828.

The court distinguished *Clark-El* on two grounds:

> This case is distinguishable from *Clark-El.* Here, the jury's *verdict* included the identity of the controlled substance, even if the elements instruction omitted it. Thus, the error was harmless as to Mr. Rivera-Zamora's conviction.
>
> * * * *
>
> As to the sentence, the charging document stated the identity of the substance Mr. Rivera-Zamora allegedly possessed with intent to deliver. Additionally, although the elements instruction omitted the word "methamphetamine," *the verdict form stated unequivocally* that it found Mr. Rivera -Zamora guilty of unlawful possession of a controlled substance with intent to deliver – methamphetamine. Because the jury expressly found that Mr. Rivera-Zamora possessed methamphetamine with intent to deliver, the sentence was authorized. The court did not err in sentencing him for that offense.

Id. at 829-30 (emphasis on *verdict* in the original; remaining emphasis added).

Consistent with this analysis, Division One held in *State v. Soto-Viera,* 2 Wn. App. 1013 (2018)[2], that if the jury verdict form indicates the substance at issue, even when missing from the to-convict instruction, the sentence based on that substance is authorized because the verdict supports the sentence. As in *Rivera-Zamora*, the court distinguished *Clark-El*:

> In *Clark-El*, the only finding in the jury's verdict was that Clark-El was guilty of delivering a controlled substance. In this case, on the other hand, the jury found Soto-Viera "guilty of the crime of Violation of the uniform Controlled Substances Act – Possession with Intent to manufacture or Deliver Cocaine as charged in Count 1." CP at 18. The jury expressly found Soto-Viera guilty of possession with intent to deliver cocaine. *The jury verdict supports Soto-Viera's sentence for a class B felony.*

Soto-Viera at 2 (emphasis added).

The jury verdict in this case specifically found the Appellant guilty of possession of heroin with intent to deliver:

> We, the jury, find the Defendant "Guilty" of the crime of Violation of the Uniform Controlled

[2] Unpublished opinion, cited pursuant to GR 14.1 as persuasive authority.

> Substances Act – Possession of Heroin with Intent to Deliver as charged.

CP 16.

In *State v. Sibert,* 168 Wn.2d 306, 230 P.3d 142 (2010), a plurality decision (four justices concurring in the opinion, a fifth in the result), the defendant was charged by information with, and was convicted of, three counts of delivery of methamphetamine and one count of possession of methamphetamine with intent to deliver. *Sibert* at 309. The to-convict instruction began with the language "[t]o convict the Defendant . . .of the crime of Delivery of a Controlled Substance *as charged . . . .",* but did not identify the controlled substance as methamphetamine. *Id.* at 312; otherwise, the instruction was in proper form. *Id.* at 313. The court found no error, as the "reference to the charging document impliedly incorporates the language "to-wit: Methamphetamine" into the "to convict" instructions. *Id.* at 312. "Sibert was aware of those charges and the attendant penalties. The jury properly

found all the required elements. Accordingly, there was no error." *Id.* at 313. "Common sense supports this conclusion. The jury considered only methamphetamine when it found that Sibert possessed and intended to deliver a controlled substance." *Id.* The court found persuasive and relied on the fact that Methamphetamine was the only drug identified in the charging document, defined in the jury instructions, and proved by the State beyond a reasonable doubt. *Id.* at 313.

Here, instruction number 6 begins with the language "[t]o convict the Defendant of the crime of Violation of the Uniform Controlled Substances Act – Possession of Heroin with Intent to Deliver, . . ." CP 11. Furthermore, the information charged Appellant with possession of heroin with intent to deliver. CP 1. Unlike *Sibert,* instead of incorporating by reference, the to-convict instruction in this case identified the controlled substance that the Appellant possessed with intent. Like *Sibert,* heroin was the only controlled substance charged in the

information, defined in the jury instructions and proved by the State beyond a reasonable doubt.

Appellant's argument that "[c]omparison [of *Rivera-Zamora*] with Rasumussen's case is hampered because the exact wording of the verdict form in *Rivera-Zamora* is not reflected in the appellate decision or the appellate briefing" (Brief of Appellant, page 63) is disingenuous. Rivera-Zamora was represented by another attorney from the same firm representing Mr. Rasmussen in this appeal, so Appellant is certainly in a position to answer a question which he himself has raised. Appellant's brief in *Rivera-Zamora conceded* that "[t]he verdict form at Rivera's trial lists the substance for count 3 as methamphetamine." Appellant's brief, *State v. Rivera-Zamora*, Westlaw, page 13. Respondent's brief in *Rivera-Zamora* also noted that "the jury's verdict *expressly* found Rivera guilty of the crime of possession of a controlled substance with intent to deliver – methamphetamine."

Respondent's brief, *State v. Rivera-Zamora,* Westlaw, page 7 (emphasis added). And, as noted previously, in *Rivera-Zamora "the verdict form stated unequivocally* that it found Mr. Rivera -Zamora guilty of unlawful possession of a controlled substance with intent to deliver – methamphetamine." *Rivera-Zamora*, 7 Wn. App. 2d at 829-30 (emphasis added).

There is no difference between the case at hand and *Rivera-Zamora.*

Under either the *Sibert* case, or *Rivera-Zamora, Soto-Viera* and *Clark-El,* there was no error in the to-convict instruction and the jury's verdict in this case supports both the conviction and the sentence. This case should not be remanded for resentencing on this ground.

3. Appellant is not entitled to resentencing in light of State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021) as there is no evidence in the record that his prior convictions rendered unconstitutional by Blake were included in his offender score or considered by the trial court at sentencing.

This case should not be remanded for resentencing in light of *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021). None of Appellant's prior felony convictions for simple possession were before the court at sentencing. The prosecutor set forth Appellant's criminal history in her Statement of Prosecuting Attorney. CP 48-53. The listed felony convictions were escape in the first degree, possession of stolen property in the first degree, VUCSA – possession of heroin with intent to deliver, trafficking in stolen property in the first degree, theft of a motor vehicle and a point for community custody, for an offender score of 6. The prosecutor set forth her reasons for opposing a DOSA:

> The Defendant is a 65 year old male with a lengthy criminal history that includes seven felony convictions. The current conviction is the Defendant's third Violation of the Uniform Controlled Substances Act – Possession of Controlled Substances with Intent to Deliver. The Defendant also has several convictions for misdemeanor/gross misdemeanor offenses which include Obstruction of Law Enforcement, Resisting Arrest, Possession of Drug Paraphernalia, and

Possession of Dangerous Weapons. The defendant's criminal history shows a clear lack of regard for the law and other people's property.

One of the State's largest concerns with the Defendant is that this is an ongoing pattern of behaviors with no end in sight. At the time of this offense the Defendant was on community custody and had just been released from an approximately five year stay in prison. The Defendant was in custody based on a 2014 case where he pled guilty to: Possession of Heroin with Intent to Deliver, Trafficking Stolen Property in the First Degree, and Possession of a Stolen motor vehicle. Within three months of release the Defendant was arrested for one of the same charges.

It appears the Defendant's counsel is seeking an evaluation for a Prison DOSA. It is the State's position that a DOSA would be inappropriate in this case. A DOSA is appropriate in a matter where the Defendant's drug addiction contributed to his criminal actions. Throughout the testimony in this case, as well as within the reports there is no indication that the Defendant's addiction is the reason he was selling controlled substances. In his recorded statement to police the Defendant stated that he was sober because he was on community custody and was required to submit to UAs. The Defendant was additionally on a Suboxone regimen, suggesting he is not actively using narcotics. That is not to suggest he is not an addict, this is simply a situation where the Defendant's addiction did not contribute to his current crime. This is a case where the Defendant was not working

> and was instead profiting off the addiction of countless others in the county.
>
> It is for these reasons the State believes a Prison DOSA would be inappropriate . . .

CP 51-52.

At no time were Appellant's unconstitutional VUCSA simple possession cases before the court. There is nothing in the record to even suggest that they were considered by the court. They were not included in his criminal history.

Neither *State v. Nugent*, 20 Wn. App. 2d 1018 (2021) (unpublished), nor *State v. Jackson*, 20 Wn. App. 2d 1039 (2021) (unpublished), both cited by Appellant on pages 69 and 70 respectively, apply. In *Nugent* prior *Blake* convictions had been considered in Nugent's offender score. The case was remanded for resentencing, even though his offender score still exceeded 9 points and thus did not change the standard range, to give the court the opportunity to reconsider its sentence withing the standard range in light of the reduced offender

score. It was not because, as Appellant suggests, because the trial court "took note of Nugent's criminal history immediately before imposing sentence." Brief of Appellant, page 69. And *Jackson* involved the vacation of a *Blake* conviction, with instructions for resentencing and for the trial court to exclude any convictions rendered unconstitutional by *Blake* at resentencing. Neither case stands for the proposition, as Appellant seems to suggest, that an appellant gets a free remand to "clean up" their criminal history.

That the court considered criminal convictions rendered unconstitutional by *Blake* is nothing more that speculation by the Appellant, as there is nothing in the record. The trial court's comments regarding Appellant's criminal history were well taken. Brief of Appellant, page 68.

The appeal and requested remand on this ground should be denied.

4. Due to prior convictions the maximum possible sentence for Appellant's conviction is twenty years in

prison; a prison term of 120 months (ten years) plus twelve months community custody does not exceed the maximum possible sentence.

RCW 69.50.408 doubles the maximum term for which a defendant may be confined for drug offenses, thereby defining a new statutory maximum. *See In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006) (clarifying that the statutory maximum is doubled, not the standard range). The combination of confinement and community custody cannot exceed the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

This Court addressed this exact issue in *State v. Bowman*, 11 Wn. App. 1066 (2020).[3] Bowman pleaded guilty possession of methamphetamine with intent to deliver. He had two prior felony convictions under RCW 69.50. Consequently, the trial court doubled his maximum sentence to 240 months under RCW 69.50.408(1). The trial court imposed a sentence of 120

[3] Unpublished opinion, cited pursuant to GR 14.1 as persuasive authority.

months confinement and 12 months community custody. The trial court listed the maximum sentence as 20 years. Bowman appealed his sentence, arguing, among other things, that the sentence exceeded the statutory maximum of ten years. This Court rejected that argument, despite the State's concession (the State hereby adopts this Court's reasoning as its own for purposes of this brief):

> Possession of methamphetamine with intent to deliver is a class B felony with a statutory maximum sentence of 10 years imprisonment. RCW 69.50.401(2)(b). Bowman's argument and the State concession that Bowman's total sentence of 132 months was unauthorized was based on that statutory maximum.
>
> However, RCW 69.50.408(1) states, "Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized . . ." This statute doubles the maximin sentence that can be imposed for a second violation of chapter 69.50 RCW. *State v. Cyr*, 8 Wn. App. 2d 834, 839, 441 P.3d 1238, *review granted*, 194 Wn.2d 1001 (2019); *see also In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006).

> Here, Bowman had two prior felony convictions under chapter 69.50 RCW. Therefore, under RCW 69.50.408 (1) the statutory maximum sentence doubled from 10 years to 20 years. Bowman acknowledged this doubled statutory maximum in his guilty plea statement, and the trial court noted the doubled statutory maximum in the judgment and sentence.
>
> The trial court imposed a total sentence of 132 months. Although that sentence exceeded the "normal" 10 year statutory maximum for possession of methamphetamine with intent to deliver, it was well within the doubled statutory maximum of 20 years. Accordingly, we affirm the trial court's sentence.

Bowman at 2.

It is undisputed that Appellant has the requisite prior convictions under RCW 69.50.408 necessary to double his maximum possible sentence. This doubled maximum sentence was included on the judgment & sentence. CP 21. The sentence of 120 months confinement plus 12 months community custody is well within the maximum possible sentence of 240 months (20 years).

The length of Appellant's sentence, including 12 months of community custody, should be affirmed.

CONCLUSION

Appellant did not receive ineffective assistance of counsel based on trial counsel's failure to object to certain testimony and comments by the State.

King and Tully's testimony was not hearsay, did not violate the confrontation clause, and was not an expression of their opinion as to Appellant's guilt.

Appellant's lack of employment was relevant to the source of the $909 found in the residence, especially given the nature of the charge. The State only touched on it briefly, and did not make it a point of focus for the jury.

The State did not commit prosecutorial misconduct with its comments on the safe and the weight of the heroin tested by the lab. The jury was properly instructed. It is presumed that a

jury follows the court's instructions. It is unlikely that these brief comments affected the jury's verdict.

Trial counsel was not ineffective for not objecting to the foregoing, and Appellant fails to show both deficient performance and prejudice.

The to-convict instruction was proper and, if in error, harmless beyond a reasonable doubt. It named the substance, heroin, that Appellant possessed with intent to deliver. The jury verdict identified heroin as the substance Appellant possessed with intent to deliver. Heroin was the only substance proved at trial. The instruction and the jury verdict support both Appellant's conviction and his sentence.

Appellant is not entitled to resentencing under *State v. Blake, supra*. Any convictions rendered unconstitutional by *Blake* were not included in his offender score nor were they considered by the court at sentencing.

Due to prior convictions, the maximum possible penalty in Appellant's case is twenty years in prison. The sentence of 120 months confinement plus 12 months community custody is well within the maximum.

For all the reasons contained herein, Appellant's conviction should be affirmed, and this appeal dismissed.

This document contains 6647 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of November, 2022.

Respectfully Submitted,

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WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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